153 US 48

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

No. 1070.

THE UNITED STATES, APPELLANT,

vs.

SIDNEY S. PRIDGEON.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED NOVEMBER 27, 1893.

(15,454)

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INDEX.

	Original.	Print.
Certificate of judges	1	1
Statement	1	1
Indictment	2	1
Sentence	4	2
Order of supreme court of Oklahoma, October 6, 1890	5	3
Questions	6	4
Clerk's certificate	8	4

10891

1 The United States circuit court of appeals for the sixth circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
SIDNEY S. PRIDGEON, APPELLEE.

Appealed from the circuit court for the southern district of Ohio, eastern division.

This cause coming on for hearing before the court, after full argument, it is ordered, in view of the important questions arising upon the record and the doubt which the court have as to the correct decision thereof, that three questions arising on said appeal shall be certified to the Supreme Court for its instructions thereon, and that accompanying said questions there shall also be certified a statement from which such questions can be understood, which statement and questions are as follows, to wit:

This is an appeal from an order of the circuit court of the United States for the southern district of Ohio, eastern division, discharging on a petition and writ of habeas corpus the appellee, Sidney S. Pridgeon, from the custody of the warden of the Ohio penitentiary, situate within said division and district, to whose custody Pridgeon had been committed by the sentence and judgment of the district court of Oklahoma Territory for the first judicial district of said Territory, sitting as and with the powers of a district court of the United States.

2 The discharge was ordered by the circuit court on the ground that the record of the conviction showed that the sentencing court had in its judgment exceeded its statutory jurisdiction by imposing hard labor as part of the punishment.

Pridgeon was tried and convicted upon the following indictment, reported and filed November 28th, 1890:

UNITED STATES OF AMERICA,
Territory of Oklahoma, Logan County ss:

In the district court for the first judicial district within and for Logan County, Oklahoma Territory, and for the Indian country attached thereto for judicial purposes, sitting with the powers of a district court of the United States of America.

UNITED STATES OF AMERICA
vs.
SID S. PRIDGEON.

Indictment for larceny of horses.

Of the September term of the said court began and held at Guthrie in said county, on the first day of September in the year of our Lord one thousand eight hundred and ninety.

The grand jurors of the United States of America, within and for said county and for that part of the Indian country in said Territory, attached to said county for judicial purposes, having been first duly sworn and empaneled and charged to enquire of offenses against the laws of the United States committed within that part of the Territory of Oklahoma so attached to Logan County for judicial purposes, as aforesaid, and described as follows to wit:

All that part of the Cherokee Outlet which lies between the line dividing ranges three and four, west of the Indian meridian, and the line
3 dividing ranges six and seven, east of the Indian meridian, except townships twenty of ranges one, two, three, and four, east of the Indian meridian, and all of the lands occupied by the Kansas, Tonkawa, Oteo, and Missouri tribes of Indians, and all that part of the land occupied by the Osage Indians which lies west of the line between ranges six and seven, east of the Indian meridian, and all that part of the Iowa and Kickapoo and Sac and Fox countries which lies north of the line which divides townships fourteen and fifteen north of ranges one, two, three, four, five and six, east of the Indian meridian, in said Territory; upon their oaths aforesaid, in the name and by the authority of the United States of America, do find and present that at and within that part of the Territory attached for judicial purposes to Logan County as aforesaid, which said part of said Territory was then and there Indian country, and a place and district of country then and there under the sole and exclusive jurisdiction of the United States of America, on the fourth duy of November in the year of our Lord —— thousand eight hundred and ninety, Sid. S. Pridgeon (whose more full name is to the grand jurors unknown), willfully, knowingly, unlawfully, and feloniously did take, steal, and carry way with intent to steal and purloin the same, certain personal property, to wit: one horse, three fillies, seven mares and six colts, then and there of the personal property of some person or persons to the grand jurors unknown and then and there of the value of twenty dollars each, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

(Signed) HORACE SPEED,
United States Attorney.

And the grand jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the United States of America, do further find and present, that at and within that part of the Territory of
4 Oklahoma attached for judicial purposes to Logan County, in said Territory, and described as follows, to wit: All that part of the Cherokee Outlet which lies between the line dividing ranges three and four, west of the Indian meridian, and the line dividing ranges six and seven, east of the Indian meridian, except townships twenty of ranges one, two, three, and four east of the Indian meridian, and all of the lands occupied by the Kansas, Tonkawa, Ponca, Oteo, and Missouri tribes of Indians, and all that part of the land occupied by the Osage Indians which lies west of the line between ranges six and seven, east of the Indian meridian, and all of that part of the Iowa and Kickapoo and the Sac and Fox countries which lies north of the line which divides townships fourteen and fifteen, north of ranges one, two, three, four, five, and six east of the Indian meridian, in said Territory, which said part of said Territory was then and there Indian country, and a place and district of country then and there under the sole and exclusive jurisdiction of the United States of America, one, the twelfth day of November, in the year of our Lord one thousand eight hundred and ninety, Sid. S. Pridgeon (whose more

full name is to the grand jurors unknown), wilfully, knowingly, unlawfully, and feloniously did take, steal, and carry away with intent to steal and purloin the same, six mares and three colts, then and there the personal goods of some person or persons to the grand jurors unknown, and then and there of the value of fifteen dollars, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

Upon February 12th, 1891, the court adjudged and sentenced "the said Sidney S. Pridgeon for the said offense by him committed, to be imprisoned in the Ohio State penitentiary at Columbus (and confined at hard
labor) for the term of five years, said term to begin at 12 o'clock
5 m. February 12th, 1891, and to pay the costs of this prosecution,
amounting to the sum of two hundred and thirty-two dollars and fifty-three cents, and to stand committed until the amount of said costs shall have been fully paid."

The only statute of the United States under which the foregoing indictment and conviction could be had and the foregoing sentence could be imposed was the act of February 15th, 1888 (25 Stat. L, 33), which provides, "That any person hereafter convicted in the United States courts having jurisdiction over the Indian Territory or parts thereof of stealing any horse, mare, gelding, filly, foal, ass, or mule, when said theft is committed in the Indian Territory, shall be punished by a fine of not more than $1,000, or by imprisonment not more than fifteen years, or by both such fine and imprisonment, at the discretion of the court."

In accordance with section "9" of "An act to provide a temporary government for Oklahoma," etc., passed May 2nd, 1890 (26 Stat. L., 81), the supreme court of Oklahoma, on October 6th, 1890, entered an order, of which only the following is material:

Exhibit.

UNITED STATES OF AMERICA,
Territory of Oklahoma, ss.:

In the matter of attaching territory not embraced in organized counties to organized counties, for judicial purposes.

It is ordered by the court that all of that part of the Cherokee Outlet which lies between the line dividing ranges three (3) and four (4) west of the Indian meridian, and the line dividing ranges six (6) and seven (7) east of the Indian meridian, except township twenty (20) of ranges one (1), two (2), three (3), and four (4) east of the Indian meridian; and
all of the lands occupied by the Kansas, Tonkawa, Ponca,
6 Otoe and Missouri tribes of Indians; and all of that part of land
occupied by the Osage Indians which lies west of the line between ranges six (6) and seven (7) east of the Indian meridian; and all that part of the Iowa and Kickapoo and Sac and Fox countries which lies north of the line which divides townships fourteen (14) and fifteen (15) north of ranges one (1), two (2), three (3), four (4), five (5), and six (6), east of the Indian meridian, is hereby attached to county number one (1), (Logan) for judicial purposes."

A comparison of the foregoing with the act of May 2nd, 1890 (cited above), establishing the boundaries of Oklahoma Territory, shows that of the territory attached to Logan County for judicial purposes in the above order, part was in Oklahoma Territory as established by said act and part was in that portion of the Cherokee Outlet not embraced within the boundaries of the Territory of Oklahoma.

The Ohio penitentiary is a prison in which the usual discipline for prisoners therein confined includes hard labor.

Questions.

First. Was horse-stealing on November 12th, 1890, in the Indian country, within the boundaries of Oklahoma Territory, as defined by the act of Congress passed May 2nd, 1890, a crime against the United States, and punishable under the act of Congress passed February 15th, 1888, denouncing horse-stealing in the Indian Territory?

Second. (Assuming the first question is answered in the negative.) Was the indictment against Pridgeon fatally defective on collateral attack by writ of habeas corpus in that it lays the venue of the offense "at and within that part of the Territory of Oklahoma attached for judicial purposes to Logan County," with a description of territory which
7 includes part of Oklahoma and part of the Cherokee Outlet not in Oklahoma, and avers the same to be "then and there Indian country, and a place then and there under the sole and exclusive jurisdiction of the United States of America?"

Third. Are the sentence of Pridgeon and his commitment in accordance therewith void by reason of the fact that they included as part of his punishment during his imprisonment in the Ohio penitentiary confinement at hard labor?

(Signed) WM. H. TAFT,
HORACE H. LURTON,
AUGUSTUS J. RICKS,
Judges sitting as the Circuit Court of Appeals of the Sixth Circuit.

LOUISVILLE, *Nov.* 15, 1893.

8 United States circuit court of appeals for the sixth circuit.

I, Walter S. Harsha, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing seven pages, numbered from one to seven, inclusive, contain a true copy of the order made November 13, A. D. 1893, in the case of The United States vs. Sidney S. Pridgeon, No. 130, October term, 1893, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of Cincinnati, this 20th day of November, A. D. 1893.

[SEAL.] WALTER S. HARSHA,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

(Indorsment on cover:) Case No. 15454. Term No. 1070. The United States, appellant, vs. Sidney S. Pridgeon. U. S. circuit court of appeals, sixth circuit. Filed November 27, 1893. (Certificate.)

Office Supreme Court U. S.
FILED.
MAR 5 1894
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, APPELLANTS,
v.
SIDNEY S. PRIDGEON.
} No. 1070.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE APPELLANTS.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, APPELLANTS,
v.
SIDNEY S. PRIDGEON.
No. 1070.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE APPELLANTS.

The brief filed by the counsel for the appellee in this court was not prepared for this court, but is the brief which they used in the circuit court of appeals. This statement is necessary in order to remind the court that the references therein made to the pages of the printed record are not to the record as printed in this court, but to the record in the circuit court of appeals, and that the allusions to the positions taken by the counsel for the Government refer to the argument in the circuit court of appeals, and not to this brief.

STATEMENT OF THE CASE.

Sidney S. Pridgeon was tried upon an indictment entitled "In the district court for the first judicial district within and for Logan County, Oklahoma Territory, and for the Indian country attached thereto for judicial purposes, sitting with the powers of a district court of the United States of America," which indictment contained two counts, for the larceny of horses, charged to have been stolen on November 4 and 12, 1890, "at and within that part of the territory attached for judicial purposes to Logan County, as aforesaid, which said part of said territory was then and there Indian country, and a place and district of country then and there under the sole and exclusive jurisdiction of the United States of America." (Record, 1, 2.) The trial resulted in a conviction; and, on February 12, 1891, the court (Record, 3) sentenced

> The said Sidney S. Pridgeon for the said offense by him committed, to be imprisoned in the Ohio State penitentiary at Columbus (and confined at hard labor) for the term of five years, said term to begin at 12 o'clock m. February 12, 1891, and to pay the costs of this prosecution, amounting to the sum of $232.53, and to stand committed until the amount of said costs shall have been fully paid.

Thereafter, on application in habeas corpus, the circuit court of the United States for the southern district of Ohio discharged Pridgeon from imprisonment, "on the ground that the record of conviction showed that the sentencing court had in its judgment exceeded its statutory jurisdiction by imposing hard labor as part of the punishment." (Record, 1; and see opinion of Sage, J., 57 Fed. Rep., 200.)

An appeal was taken from said order to the circuit court of appeals for the sixth circuit, which court, after full argument, ordered, "in view of the important questions arising upon the record and the doubt which the court have as to the correct decision thereof," that the following questions be certified to this court for its instructions thereon, to wit:

THE QUESTIONS CERTIFIED.

First. Was horse stealing on November 12, 1890, in the Indian country, within the boundaries of Oklahoma Territory, as defined by the act of Congress passed May 2, 1890, a crime against the United States, and punishable under the act of Congress passed February 15, 1888, denouncing horse stealing in the Indian Territory?

Second. (Assuming the first question is answered in the negative.) Was the indictment against Pridgeon fatally defective on collateral attack by writ of habeas corpus in that it lays the venue of the offense "at and within that part of the Territory of Oklahoma attached for judicial purposes to Logan County," with a description of territory which includes part of Oklahoma and part of the Cherokee Outlet not in Oklahoma, and avers the same to be "then and there Indian country, and a place then and there under the sole and exclusive jurisdiction of the United States of America?"

Third. Are the sentence of Pridgeon and his commitment in accordance therewith void by reason of the fact that they included as part of his punishment during his imprisonment in the Ohio penitentiary confinement at hard labor?

ARGUMENT.

I.

THE ACT OF FEBRUARY 15, 1888, C. 10, PUNISHING HORSE STEALING IN THE INDIAN TERRITORY WAS SUPERSEDED BY THE ACT OF MAY 2, 1890, C. 182, WITH RESPECT TO SO MUCH OF THE INDIAN TERRITORY AS WAS MADE A PART OF THE TERRITORY OF OKLAHOMA BY THE LATTER ACT. THE FIRST QUESTION CERTIFIED MUST, THEREFORE, BE ANSWERED IN THE NEGATIVE.

The act of May 2, 1890 (c. 182, 26 Stat., 81), which creates the Territory of Oklahoma out of a part of the Indian Territory, defines the territorial limits of the new Territory (sec. 1), vests the executive power thereof in a governor (sec. 2), the legislative power in the governor and general assembly (sec. 4), and the judicial power in a supreme court, district courts, probate courts, and justices of the peace (sec. 9). It declares "that the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States" (sec. 6). By section 11 certain named chapters and provisions of the Compiled Laws of the State of Nebraska, in force November 1, 1889, including part 3 thereof, entitled the Criminal Code, "in so far as they are locally applicable, and not in conflict with the laws of the United States, or with this act, are hereby extended to and put in force in the Territory of Oklahoma until after the adjournment of the first session of the legislative assembly of said Territory."

The obvious effect of these provisions was to vest the legislature of the newly-created Territory of Oklahoma with general power to establish a criminal code, and pending the first meeting and adjournment of that legislature the Criminal Code of Nebraska was adopted by Congress as a provisional measure. Among the criminal laws thus provisionally put in force in Oklahoma pending the meeting and adjournment of her first legislature was sec. 117 of the Criminal Code of Nebraska, which punishes horse stealing by imprisonment in the penitentiary "not more than ten nor less than one year." And since the first session of the legislature of Oklahoma did not adjourn until December 24, 1890 (1 Okl., 54; Stats. of Okl., 1890, III), this statute of Nebraska was the law, and the only law, by which horse stealing within the territorial limits of the Territory of Oklahoma, as defined by section 1 of the act of May 2, 1890 organizing that Territory, could be punished on November 4 and 12, 1890 the dates of the offenses for which Pridgeon was indicted.

It follows that the first question certified by the circuit court of appeals must be answered in the negative. Larceny is a crime of local nature, and it is utterly inconsistent, not only with the specific provisions of section 11 of the organic act of May 2, 1890, but with the general scope and purpose of that act, to suppose that Congress meant that either the general provisions of Revised Statutes, sec. 5356, denouncing larceny "upon the high seas or in any place under the exclusive jurisdiction of the United States," or the provisions of the act of February 15, 1888, c. 10, prescribing the punishment for horse stealing in the Indian Territory, should remain in force in the Territory of Oklahoma after the erection of the territorial government.

This view, so far as it affects the Indian reservations embraced within the territorial limits of Oklahoma, is in harmony with the general policy of Congress. The Osage and other Indian reservations mentioned in the indictment are expressly included by the act of May 2, 1890, within the boundaries of Oklahoma Territory, unlike instances where Indian country has been, by act of Congress or otherwise, expressly excluded from the boundaries of a Territory or State, as in cases illustrated in *Ex parte Crow Dog*, 109 U. S., 556, 559; *U. S.* v. *Ewing*, 47 Fed. Rep., 809; and *U. S.* v. *Partello*, 48 Fed. Rep., 670.

And if we consider prior legislation of Congress as to Territories, such as the act of March 3, 1885, c. 341, sec. 9, 23 Stat., 385, which undoubtedly has a prospective operation, whereby the jurisdiction of Territorial courts is extended over *Indians* committing larceny and other enumerated offenses, within a Territory of the United States, and either within or without an Indian reservation, it would seem beyond argument that in the act organizing Oklahoma power over the subject of larceny was intended to be conferred upon the legislature and the courts of the Territory with respect to whites as well as Indians. By said act of May 3, 1885, Indians were made subject within a Territory to the laws of such Territory relating to larceny and other enumerated crimes, and to trial therefor in the same courts and in the same manner, and are made amenable to the same penalties as are all other persons charged with the commission of said crimes, respectively. (See the observations of Mr. Justice Brown on this act in *Gon-Shay-ee, petitioner*, 130 U. S., 343, 349–352.) Section 12 of the act of May 2, 1890, evinces the intention of Congress that the jurisdiction of the courts of the Territory should be excluded, within the Territory of Oklahoma, only from controversies between Indians of the same tribes, while sustaining their tribal relations.

BUT IT DOES NOT FOLLOW THAT THE COURTS OF OKLAHOMA, SITTING AS COURTS OF THE UNITED STATES, DID NOT HAVE JURISDICTION TO PUNISH HORSE-STEALING IN THE TERRITORY, COMMITTED PRIOR TO THE ADJOURNMENT OF THE FIRST SESSION OF THE LEGISLATURE OF OKLAHOMA.

While I am obliged to admit that the act of February 15, 1888, was not in force in Oklahoma on November 12, 1890, but had been superseded by the provisions of section 11 of the act of May 2, 1890, adopting the criminal code of Nebraska as a provisional code for the Territory of Oklahoma, this provisional code had the force and effect of law as an act of Congress, and not as an act of the legislature of Nebraska; and the question remains whether an offense against such provisional code was not an offense against the United States punishable on the Federal side of the courts of the Territory.

It is true that section 11 further provides that "the supreme and district courts of said Territory shall have the same power to enforce the laws of the State of Nebraska, hereby extended to and put in force in said Territory, as courts of like jurisdiction have in said State." The declaration, it will be observed, is not that the courts of the Territory of Oklahoma shall have power to enforce the laws of Nebraska, thus put in force by Congress in the Territory of Oklahoma, *to the same extent as if said laws had been enacted by the legislature of Oklahoma.* It seems to have been assumed, however, by the supreme court of Oklahoma and by its legislature, that the provisional criminal code so established was established by Congress in lieu of the Territorial legislature, and was to have the same effect as if it had been enacted by the Territorial legislature, and was to be dealt with as if the crimes thereby declared were crimes, not against the United States, but against the Territory. In *Ex Parte Larkin*, 1 Oklahoma, 53, 57, Green, C. J., says:

> It was intended by Congress that the laws of Nebraska should constitute a *Territorial code*, as distinguished from the laws of the United States in force in the Territory of Oklahoma, and that they should sustain the same relations to the courts and to the people of the Territory and to the legislative assembly as a code of laws enacted by the legislative assembly.

If this view of the supreme court of Oklahoma be correct, the court which tried Pridgeon, sitting, as it did, as a court of the United States, did not have jurisdiction of horse-stealing within the territorial limits of the Territory of Oklahoma, and Pridgeon would be entitled to his discharge if the indictment can not be construed, on collateral attack, otherwise than as charging the offenses to have been committed within those limits. If, however, the court should be of opinion that section 11 of the act of May 2, 1890, is to be treated as establishing the provisional criminal code therein mentioned as a law of the United States, pending the first meeting and adjournment of the Oklahoma legislature, so as to make horse-stealing during that time a crime, not against the Territorial government, but against the United States, the proceedings on the Federal side of the court were lawful. The sentence of five years was within the limit permitted by section 117 of the Nebraska criminal code; the imposition of hard labor was also authorized.

Section 498 of the criminal code of Nebraska provides that—

> In all cases when any person shall be convicted of any offense by this code declared criminal, and made punishable by imprisonment in the penitentiary, the court shall declare in their sentence for what period of time within the respective periods prescribed by law, such convict shall be imprisoned at hard labor in the penitentiary.

And section 11 of the act of May 2, 1890, provides that—

> The supreme and district courts of said Territory shall have the *same power* to enforce the laws of the State of Nebraska, hereby extended to and put in force in said Territory, as courts of like jurisdiction have in said State.

No embarassment arises in treating the provisional criminal code as an act of Congress, whose violation creates an offense against the United States, from the fact that by section 11 of the act of May 2, 1890, such code was established to endure only until the adjournment of the first session of the Oklahoma legislature, and that Prigeon's conviction occurred after that date; for the Revised Statutes, section 13, provide that—

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for

> the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

In *United States* v. *Ulrici* (3 Dillon, 532) it was held by Mr. Justice Miller that this section applied to criminal statutes, and authorized indictment and conviction even after the repeal of the statute creating the offense.

II.

THE ACT OF FEBRUARY 15, 1888, PRESCRIBING THE PUNISHMENT FOR HORSE-STEALING IN THE INDIAN TERRITORY, REMAINED, NOTWITHSTANDING THE ACT OF MAY 2, 1890, IN FORCE IN THAT PORTION OF THE INDIAN TERRITORY (CHEROKEE OUTLET) NOT ABSORBED IN OKLAHOMA TERRITORY; AND ON COLLATERAL ATTACK PRIDGEON'S CONVICTION MUST BE HELD TO HAVE BEEN FOR HORSE-STEALING IN THE CHEROKEE OUTLET. IT IS, THEREFORE, NOT VOID, AND THE SECOND QUESTION SHOULD BE ANSWERED IN THE NEGATIVE.

The act of February 15, 1888, c. 10, 25 Stat., 33, provides, section 1—

> That any person hereafter convicted in the United States courts having jurisdiction over the Indian Territory *or parts thereof*, of stealing any horse, mare, gelding, filly, foal, ass, or mule, when said theft is committed in the Indian Territory, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than fifteen years, or by both such fine and imprisonment, at the discretion of the court.

With respect to that portion of the Indian Territory which was taken into Oklahoma Territory, this act, as I have admitted, was superseded by the provisions of the act of May 2, 1890, but the act was not otherwise modified or repealed, and remained in force with respect to so much of the Indian Territory as was not put into Oklahoma. The unoccupied portion of the Cherokee Outlet was a part of the Indian Territory immediately prior to the passage of the act of May 2, 1890, and being expressly excepted by the first paragraph of section 1 of that act from the new Territory of Oklahoma, it remained a part of the Indian Territory. By paragraph 4 of section 1 it was not to become a part of the Territory of Oklahoma until proclamation by the President that the interest of the Cherokees in it had been extinguished. In that respect, the tract was placed precisely in the same position as the "other" lands *within the Indian Territory* not embraced within Oklahoma (par. 5, sec. 1). And by section 9 it was provided that—

> In addition to the jurisdiction otherwise conferred by this act, said district courts [of the Territory of Oklahoma] shall have and exercise exclusive original jurisdiction over all offenses against the laws of the United States committed within that portion of the Cherokee Outlet not embraced within the boundaries of said Territory of Oklahoma as herein defined.

The section further provides that—

> For all judicial purposes as herein defined such portion of the Cherokee Outlet not embraced within the boundaries of the Territory of Oklahoma, shall be attached to, and be a part of, one of the judicial districts of said Territory as may be designated by the Supreme Court.

It was in accordance with this authority that the supreme court of Oklahoma made the designation mentioned in the record (p. 3), whereby the territory therein described, including part of the Cherokee Outlet as well as certain land within the boundaries of the Territory, was attached for judicial purposes to the district court for the first judicial district, which had jurisdiction over Logan County.

It would seem clear from these provisions—

(1) That the act of February 15, 1888, remained in force for the punishment of horse-stealing in the Cherokee Outlet after the organization of the Territory of Oklahoma, and—

(2) That jurisdiction for the punishment of the offense was conferred upon the district courts of the Territory to which the Cherokee Outlet was attached by order of the supreme court of Oklahoma for judicial purposes. The offense being against a law of the United States, the prosecution would, of course, be on the Federal side of the court. (*Gon-Shay-ee, petitioner*, 130 U. S., 343.)

It is true that by section 29 of the act of May 2, 1890, a new definition of the Indian Territory is given, which does not include the Cherokee Outlet, but the Indian Territory there referred to is so called only for the purposes of the succeeding sections of that act, and with respect to the jurisdiction of the courts therein referred to. The Indian Territory there defined embraces the territory occupied by the civilized nations; and it became convenient for the purpose of reference to speak of their lands as a whole, and the term Indian Territory was given to it. There is nowhere in the act any suggestion that the Cherokee Outlet portion of the Indian Territory, excepted from the new Territory of Oklahoma, should no longer, for legislative purposes, be considered a part of the Indian Territory;

but in consequence of Oklahoma being given jurisdiction over it for "judicial purposes," it was for judicial purposes conveniently distinguished from the remaining portion of the Indian Territory.

It will be noticed that by section 33 of the act of May 2, 1890, the criminal code of Arkansas was put in force in the Indian Territory as defined by section 29, with the proviso "that in all cases where the laws of the United States and the said criminal laws of Arkansas have provided for the punishment of the same offenses, the laws of the United States shall govern as to such offenses." So that the act of February 15, 1888, remained in force for the punishment of horse stealing in so much of the Indian Territory as is defined by section 29. There is no reason to suppose that Congress intended a different punishment for the same offense in the Cherokee Outlet, which was the only other portion of the Indian Territory covered by the act of February 15, 1888, that had not been absorbed by the Territory of Oklahoma.

ON COLLATERAL ATTACK THE CONVICTION MUST BE HELD TO HAVE BEEN FOR HORSE STEALING IN THE CHEROKEE OUTLET, WITHIN THE JURISDICTION OF THE COURT.

In construing an indictment, "the doctrine is general, that the court will consult common sense to the disregard of captious objections, in looking for the meaning of allegations in an indictment. Moreover, of two permissible constructions, it will adopt the one sustaining the proceedings." I Bishop's Criminal Procedure (3d ed.), sec. 356.

The indictment in question is entitled, "In the district court of the first judicial district within and for Logan County, Oklahoma Territory, *and for the Indian country attached thereto for judicial purposes*, sitting with the powers of a district court of the United States of America."

In the commencement of the indictment it is recited that—

> The grand jurors of the United States of America within and for said county, and for that part of the Indian country in said Territory attached to said county for judicial purposes, having been first duly sworn and empaneled and charged to inquire of offenses against the laws of the United States committed within that part of the Territory of Oklahoma so attached to Logan County for judicial purposes, as aforesaid, and described as follows, to wit: [Then follows the same specific description as is contained in the order of the supreme court of Oklahoma, including, as the circuit court of appeals finds (Record, 3,4), land partly within the actual territorial limits of Oklahoma and partly beyond in the Cherokee Outlet], upon their oaths aforesaid, in the name and by the authority of the United States of America, do find and present that *at and within that part of the Territory attached for judicial purposes to Logan County*, as aforesaid, *which said part of said Territory was Indian country*, and a place and district of country *then and there under the sole and exclusive jurisdiction of the United States of America*, on the fourth day of November, Sid S. Pridgeon stole certain described horses.

The second count is as follows:

> And the grand jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the

United States of America, do further find and present, that at and within *that part of the Territory of Oklahoma attached for judicial purposes to Logan county* (in said Territory, and described as follows, to wit), * * * *which said part of said Territory was then and there Indian country, and a place and district of country then and there under the sole and exclusive jurisdiction of the United States of America,* on the twelfth day of November, Sid S. Pridgeon stole certain described horses.

1. I submit that the specifically described land, which was partly within and partly without the territorial limits of Oklahoma, is what is alluded to in the commencement of the indictment as "that part of the Territory of Oklahoma attached for judicial purposes to Logan County, in said Territory," and in the charging part as "that part of the Territory attached for judicial purposes to Logan County as aforesaid." The order of the supreme court of Oklahoma does not specifically designate the Cherokee Outlet strip mentioned in its order as being *without* the boundaries of the Territory and the Indian reservations as within those boundaries, and it was doubtless considered that all the "territory" "attached" was to be deemed a part of the Territory "for judicial purposes."

Such would appear to have been the view of this court when making, in October term, 1890, its order attaching the Territory of Oklahoma to the eighth judicial circuit. (139 U. S., 707.) The language used is: "The Territories of New Mexico, Oklahoma, and Utah are assigned to the eighth judicial circuit." "The Territory of Oklahoma" thus assigned to the eighth judicial circuit included not only the actual territorial limits of Oklahoma, but the Cherokee Outlet attached thereto for judicial purposes, and this court seemed to regard the term "Territory of Oklahoma" as an appropriate designation of the whole, including the Cherokee Outlet, which, although outside the territorial limits, is attached to the Territory for judicial purposes, and in that sense is a part thereof.

Each count of the indictment avers that the offense was committed "within that part of the Territory of Oklahoma attached for judicial purposes to Logan County, in said Territory, and described as follows, to wit." The specific description refers to and defines *all* the land previously alleged to be "part of the Territory of Oklahoma," etc. Had the intention been to exclude the Cherokee Outlet portion of the specifically described land, such portion could have been readily omitted from the specific description, or if the indictment had alleged that the offenses were committed "within *such* portion of the Territory of Oklahoma, attached for judicial purposes to Logan County, in said Territory, *as is embraced* within the following description, to wit," the petitioners claim that the offense is alleged to have been committed within the *actual* territorial boundaries of Oklahoma would be good.

If by "the Territory of Oklahoma" referred to in the indictment as the place where the offense was committed, was meant all the territory attached by the supreme court of Oklahoma to Logan County "for judicial purposes," the further allegation "which said part of said territory was then and there Indian country, and a place and district of country *then and there under the sole and exclusive jurisdiction of the United States of America,*" made the whole an appropriate description of the Cherokee Outlet. For if Congress had surrendered to the new Territory jurisdiction over offenses committed upon Indian reservations *within the boundaries of Oklahoma,* those reservations could not be said to be "then and there under the sole and exclusive jurisdiction of the United States," and nothing else but the Cherokee Outlet answered the description: "that part of the Territory of Oklahoma attached thereto for judicial purposes, which was then and there Indian country and under the sole and exclusive jurisdiction of the United States of America."

I submit then that the indictment may, and on collateral attack must, be construed as charging the offenses to have been committed in the Cherokee Outlet.

2. The indictment is at least broad enough to charge the offenses to have been committed within the territory specifically described in the indictment, *which included the Cherokee Outlet,* and if the court had jurisdiction over the offense of larceny committed within a part of the territory mentioned in the indictment it had power to decide upon the sufficiency of the indictment as to charging an offense within its jurisdiction, and such decision can not be reviewed on habeas corpus. It is said in I Bishops Criminal Procedure (3d ed.) sec. 375, that—

> If the jurisdiction of the court extends over less space than the county, a mere alleging that the offense

was committed within the county is insufficient; because, in spite of what is thus disclosed, the tribunal may be without jurisdiction.

Among the cases cited by the author is *McBride* v. *State* (10 Hump., 615), where, upon an *appeal* from a conviction for larceny, it was held that an indictment charging the commission of an offense within the county of Shelby, when the court's jurisdiction extended only over a portion of the county, was defective, as not showing that the offense was committed within the jurisdiction of the court; and the proceedings were held *erroneous;* while in the two other cases cited by the author (*Commonwealth* v. *Richards*, 1 Va., Cas. 1, and *Taylor* v. *Commonwealth*, 2 Va., Cas. 94), it was held on appeal that the want of a special averment in the indictment, that the offense was committed within the jurisdiction of the court, was cured by verdict. I find no authority intimating that such a defective indictment renders the subsequent proceedings and conviction absolutely void.

The most that can be said is that the indictment at bar was subject to demurrer for indefiniteness in failing to show whether the offense was committed within that particular *part* of the land described in the indictment over which the court had jurisdiction. But after issue joined and trial, it will be presumed that the proof made certain that which was indefinite in the indictment, and that the conviction was for an offense committed within the jurisdiction of the court.

III.

THE THIRD QUESTION CERTIFIED: ARE THE SENTENCE OF PRIDGEON AND HIS COMMITMENT IN ACCORDANCE THEREWITH VOID, BY REASON OF THE FACT THAT THEY INCLUDED AS PART OF HIS PUNISHMENT DURING HIS IMPRISONMENT IN THE OHIO PENITENTIARY CONFINEMENT AT HARD LABOR?

1. If the court reaches the conclusion that the act of February 15, 1888, for the punishment of horse stealing, was in force in the Cherokee Outlet on November 12, 1890, and that the conviction can be sustained, on collateral attack, as of an offense committed within the Cherokee Outlet, the term of five years for which the prisoner was sentenced is within the limit prescribed by the act, which authorizes "a fine of not more than one thousand dollars, or imprisonment not more than fifteen years, or both such fine and imprisonment at the discretion of the court." The act does not specifically authorize imprisonment at hard labor, but the court has held it competent to sentence under such an act to imprisonment in a penitentiary where hard labor is a part of the usual discipline. In *Ex parte Karstendick*, 93 U. S., 369, 399, Chief Justice Waite said, and his language is quoted by Mr. Justice Harlan, in *In re Mills*, 135 U. S., 266:

> In cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence. But where the statute requires punishment alone, the several provisions which have just been referred to place it within the power of the court, at its discretion, to order execution of its sentence at a place where labor is exacted as part of the discipline and treatment of the institution or not, as it pleases. Thus a wide range of punishment

> is given, and the courts are left at liberty to graduate their sentences so as to meet the ever-varying circumstances of the cases which come before them.

It is stated in the record, page 4, that the Ohio penitentiary "is a prison in which the usual discipline for prisoners therein confined includes hard labor;" and I submit that the provision for hard labor in the sentence is, after all, but equivalent to a sentence to simple imprisonment in the Ohio penitentiary, and does not justify the release of the prisoner on habeas corpus. In *In re Mills,* 135 U. S., 263, 266, Mr. Justice Harlan said:

> An offense which the statute imperatively requires to be punished by imprisonment "at hard labor," and one that must be punished by "imprisonment," but the sentence to which imprisonment the court may, in certain cases and in its discretion, require to be executed in a penitentiary where hard labor is prescribed for convicts, are each "punishable" by imprisonment at hard labor. The former offense certainly must be thus punished; *and as the latter may, in the discretion of the court, be so punished, it may also, and not unreasonably, be held to be "punishable" by imprisonment at hard labor.*

It may be that upon writ of error the prisoner would be entitled to a modification of his sentence by striking out "hard labor," but a writ of habeas corpus can not be used for that purpose, because, if the prisoner were discharged from the Ohio penitentiary upon habeas corpus, it would be competent for the trial court to sentence him again to that very penitentiary, where his punishment would not be different from that which he now endures. The writ of habeas corpus will not be issued except to accomplish some substantial result.

2. If the court reaches the conclusion that the provisional code established by section 11 of the act of May 2, 1890, is to be treated, pending the first meeting and adjournment of the legislature of Oklahoma, as a law of the United States, giving jurisdiction for violations thereof to the Federal side of the court, the sentence is not open to objection.

3. Upon either of the two foregoing hypotheses the writ should be denied. If, however, the court reaches the conclusion that the indictment can only be construed as charging the offenses to have been committed within the actual territorial limits of the Territory of Oklahoma, and that the provisional criminal code established by section 11 of the act of May 2, 1890, is not to be treated as a law of the United States, pending the first meeting and adjournment of the legislature of Oklahoma, so as to authorize a prosecution on the Federal side of the court, then Pridgeon's conviction was without jurisdiction, and he should be discharged.

4. Or if the court should reach the conclusion that horse-stealing in the Cherokee Outlet on November 12, 1890, could not be punished under the act of February 15, 1888, but only under Revised Statutes, section 5356, covering larceny "upon the high seas or any place under the exclusive jurisdiction of the United States," and that the conviction can not be sustained except under that section, the prisoner, having already endured the maximum imprisonment authorized by the section, is entitled, under *In re Bonner, petitioner*, 151 U. S., 242, to an absolute discharge.

CONCLUSION.

I understand the fact to be that the offenses for which the prisoner was convicted were horse-stealing in the Cherokee Outlet, and I respectfully submit that the judges of the circuit court of appeals should be advised that the conviction must be sustained upon this collateral attack as of that offense; that the act of February 15, 1888, was then in force in the Cherokee Outlet, and that the prisoner was consequently properly convicted and sentenced under that act.

LAWRENCE MAXWELL, JR.,
Solicitor-General.

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CLERK.

NO. 1070.

SUPREME COURT OF THE UNITED STATES

The United States of America,
APPELLANT.

vs.

Sidney S. Pridgeon,
APPELLEE.

On Certificate from the U. S. Circuit Court of Appeals
for the Sixth Circuit.

BRIEF.

D. K. WATSON,
A. H. JOHNSON,
E. C. IRVINE,
ATTORNEYS FOR APPELLEE.

SUPREME COURT OF THE UNITED STATES

BRIEF FOR APPELLEE.

THE UNITED STATES OF AMERICA, *Appellant,* *vs.* SIDNEY S. PRIDGEON, *Appellee.*	No. 1070

STATEMENT.

At the September term, 1890, of the District Court for the First Judicial District, within and for Logan county, Oklahoma Territory, and for the Indian country attached thereto for judicial purposes, sitting with the powers of a District Court of the United States of America, the appellee, Sidney S. Pridgeon, was indicted by the grand jurors of the United States of America within and for said county and for that part of the Indian country in said territory attached to said county for judicial purposes, for the larceny of horses in Indian country within said territory attached to Logan county for judicial purposes, which said Indian country is alleged to be under the sole and exclusive jurisdiction of the United States.

At the September adjourned term of said court, in February, 1891, the appellee was tried in said court, sitting with the powers of a District Court of the United States as aforesaid, and found guilty as charged. Thereupon the Court sentenced the appellee to be confined in the penitentiary at Columbus, Ohio, for the period of five years at hard labor, said sentence to begin February 12th, 1891.

The imprisonment under said sentence began on said day and still continues.

On July 7th, 1893, said appellee filed a petition for a writ of habeas corpus in the United States Circuit Court for the Southern District of Ohio, Eastern Division, to be directed to the warden of the Ohio Penitentiary, and alleging that he was wrongfully restrained of his liberty and praying for his discharge. (Record page 2.)

Said application was heard, and on the 2d day of August, 1893, the Circuit Court below found that the appellee was unlawfully restrained of his liberty and ordered his release, to which finding of the court the United States Attorney excepted and prayed for the allowance of an appeal which was granted. (Record page 27.)

The grounds relied upon by the appellee for his discharge are set forth in said petition. (Record, pages 2 and 3.)

ARGUMENT.

The counsel for appellant, in his brief, considers four grounds only. We will consider them in the order presented:

I.

Did the court which tried and sentenced the prisoner have jurisdiction of the offense ?

It is conceded by the appellee that it had jurisdiction of the offense as alleged in the indictment, but it is contended that it had no jurisdiction to impose the sentence under the act of February 15th, 1888, as claimed by appellant, neither had it jurisdiction to sentence the appellee to imprisonment in a penitentiary.

II.

Was the act of February 15th, 1888, (Vol. 1 Sup. R. S. U. S., page 578) in force in that part of the Indian country attached to Logan county, Oklahoma Territory, for judicial purposes?

The appellee contends that it was not, and that the trial court had no authority or jurisdiction to pronounce sentence under this act, and if so pronounced the sentence is illegal and void, for the following reasons:

1. Because it is not a general law of the United States, but a special law applying to the Indian Territory only.

2. Because said act can be enforced by those courts only that have jurisdiction over the *Indian Territory*, and applies to those offenses only that are committed in the Indian Territory. Said act provides as follows:

"That any person hereafter convicted in the United States Court having jurisdiction over the Indian Territory, or parts thereof, of stealing any horse, mare, gelding, filly, foal, ass or mule, when said theft is committed in the Indian Territory, shall be punished by a fine of not more than one thousand dollars or by imprisonment not more than fifteen years, or both said fine and imprisonment, at the discretion of the Court."

The only courts that now have, or ever did have, jurisdiction over the Indian Territory since 1834 are as follows:

First. By Section 533 R. S. U. S. the United States District and Circuit Courts of the western District of Arkansas were given jurisdiction over all offenses committed in "the country lying west of Missouri and Arkansas, known as the Indian Territory," and said court continued to exercise such jurisdiction until January 6th, 1883.

Second. By the act of January 6th, 1883, the District Courts of Kansas and the Northern District of Texas were given jurisdiction over the *Indian Territory.*

Sup. to U. S. Statutes, Vol. 1, pp. 389 and 390.

Sec. 2. "That all that part of the Indian Territory lying north of the Canadian river and east of Texas and the one hundredth meridian, not set apart and occupied by the Cherokee, Creek, and Seminole Indian tribes, shall, from and after the passage of this act be annexed to and constitute a part of the United States Judicial District of Kansas; and the United States District Courts at Wichita and Fort Scott, in the District of Kansas, shall have exclusive original jurisdiction of all offenses committed within the limits of the territory hereby annexed to said District of Kansas, against any of the laws of the United States now or that may hereafter be operative therein."

Sec. 3. "That all that part of the Indian Territory not annexed to the District of Kansas by this act and not set apart and occupied by the Cherokees, Creek, Choctaw, Chickasaw and Seminole Indian tribes shall, from and after the passage of this act, be annexed to and constitute a part of the United States Judicial District known as the Northern Judicial District of Texas; and the United States District Court at Graham, in said Northern District of Texas, shall have exclusive original jurisdiction of all offenses committed within the limits of the territory hereby annexed to said Northern District of Texas, against any of the laws of the United States now or that may hereafter be operative therein."

Sec. 4. "That nothing contained in this act shall be construed to affect in any manner any action or proceeding now pending in the Circuit or District Court for the western District of Arkansas, nor the execution of any process relating thereto; nor shall anything in this act be construed to give to said District Courts of Kansas and Texas, respectively, any greater jurisdiction in that part of said Indian Territory so as aforesaid annexed, respectively, to said District of Kansas and said Northern District of Texas than might heretofore have been exercised therein by the Western District of Arkansas; nor shall anything in this act contained be construed to violate or impair in any respect any treaty provisions whatever."

This act of January 6th, 1883, repeals said Section 533 so far as it applies to the jurisdiction of the United States Courts of said Western District of Arkansas over the Indian Territory.

The act of March 1st, 1889, Sup. to U. S. Statutes, page 674, Section 17, by implication repeals Section 3 of the act of January 6th, 1883.

It provides that the Chickasaw Nation, and a portion of the Choctaw Nation therein described, "and all that portion of the Indian Territory not annexed to the District of Kansas by the act of January 6th, 1883, and not set apart and occupied by the five civilized tribes, shall, from and after the passage of this act, be annexed to and constitute a part of the *Eastern* Judicial District of Texas, for Judicial purposes," thereby changing the jurisdiction from the Northern to the Eastern Judicial District of Texas.

Act March 1st, 1889, Section 18: "That the counties of Lamar, Fannin, Red River and Delta, of the State of Texas, and all that part of the Indian Territory attached to said Eastern Judicial District of the State of Texas by the provisions of this act, shall constitute a division of the Eastern Judicial District of Texas; and terms of the Circuit and District Courts of the United States for the said Eastern District of Texas shall be held twice in each year at the City of Paris on the third Mondays in April and the second Mondays in October; and the United States Courts herein provided to be held at Paris shall have exclusive original jurisdiction of all offenses committed against the laws of the United States within the limits of that portion of the Indian Territory attached to the Eastern Judicial District of the State of Texas by the provisions of this act, of which jurisdiction is not given by this act to the court herein established in the Indian Territory," &c.

Third. By the act of March 1st, 1889, Sup. to U. S.

Statutes, page 670, a court was established having jurisdiction of certain offenses committed in the Indian Territory.

Sec. 1. "That a United States Court is hereby established, whose jurisdiction shall extend over the Indian Territory, bounded as follows, to-wit: North by the State of Kansas, east by the States of Missouri and Arkansas, south by the State of Texas, and west by the State of Texas and the Territory of New Mexico."

Sec. 5. "The court hereby established shall have exclusive original jurisdiction over all offenses against the laws of the United States *committed within the Indian Territory, as in this act defined, not punishable by death or by imprisonment at hard labor.*"

By the act of May 2d, 1890, Sec. 29, the jurisdiction of said court was limited to the Indian Territory as therein defined, as follows: "That all that part of the United States which is bounded on the north by the State of Kansas, on the east by the States of Missouri and Arkansas, on the south by the State of Texas, and on the west and north by the Territory of Oklahoma as defined in this act, shall for the purposes of this act be known as Indian Territory."

The only courts, therefore, that had authority or jurisdiction to impose the penalties provided for by said act of February 15th, 1888, at the time of the commission of and trial for the offense charged against the appellee, were either the United States District Court of Kansas, the Eastern Judicial District of Texas, or the court established for the Indian Territory by said act of March 1st, 1889. (Vol. 1, Sup. U. S. R. S., page 670.)

Unless one of these courts tried the appellee the act cannot apply.

It is not claimed by the appellant that the prisoner was tried by either of these courts, but, on the contrary, it is conceded that he was tried by the courts of the Territory of Oklahoma, sitting with the powers of a district court of the United States.

These courts had no jurisdiction over the Indian Territory.

They were created by the act of May 2d, 1890, Vol. 1, Sup. U. S. R. S., page 720, entitled "An Act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States Court in the Indian Territory, and for other purposes."

Section 1 of this act provides that a part of the Indian Territory is erected into a temporary government under the name of the Oklahoma Territory, and defines the boundaries thereof.

Section 29 provides that certain country therein described shall thereafter be known as the Indian Territory, and that "An Act to establish a United States Court in the Indian Territory, and for other purposes, approved March 1st, 1889, is limited to and shall extend only over the Indian Territory, as defined in this section, and that the provisions of this act hereinafter set forth shall apply to said Indian Territory only."

The judiciary of said Territory of Oklahoma and the jurisdiction thereof is provided for by section 9 of said act.

These courts are of a dual nature. They sit as Territorial Courts to administer the laws of the Territory and as United States Courts to administer the laws of the United States.

Ex parte Gon-Shay-ee, 130 U. S., 343.

Ex parte Crow Dog, 109 U. S., 556.

The jurisdiction of the Oklahoma courts does not extend to the Indian Territory, and they, therefore, have no jurisdiction to impose the penalties under act of February 15th aforesaid.

Section 9 further provides that "said Territory shall be divided into three Judicial Districts, and a District Court shall be held in each county in said district thereof by one of the Justices of the Supreme Court, at such time and place as may be prescribed by law, and each judge after assignment shall reside in the district to which he is assigned. The Supreme Court shall define said Judicial Districts, etc. * * * * * And the territory not embraced in organized counties shall be attached for judicial purposes to such organized county or counties as the Supreme Court may determine."

The territory so attached to Logan county (which was formerly county number one) is shown at page 18 of the Record.

Section 9 further provides: "And each of said District Courts shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the Circuit and District Courts of the United States.

In addition to the jurisdiction otherwise conferred by this act, said District Courts shall have and exercise exclusive original jurisdiction over all offenses against the laws of the United States committed within that portion of the Cherokee Outlet not embraced within the boundaries of said Territory of Oklahoma as herein defined. * * * * For all judicial purposes herein defined such portion of the Cherokee Outlet not embraced within the boundaries of the Territory of Oklahoma shall be attached to and be a part of one of the Judicial Districts of said Territory as may be designated by the Supreme Court. And all acts and parts of acts heretofore enacted, conferring jurisdiction upon the United States Courts held beyond and outside the limits of the Territory of Oklahoma as herein defined, as to all causes of action or offenses in said Territory, and in that portion of the Cherokee Outlet herein before referred to, are hereby repealed, and such jurisdiction is hereby given to the Supreme and District Courts of said Territory." * * * *

The appellee was not charged with the offense of horse stealing in the Indian Territory, but was charged in the indictment with stealing horses in that part of the Territory of Oklahoma attached to Logan county for judicial purposes, which said part of said Territory was then and there Indian country.

The Indian country attached to Logan county for judicial purposes by the order of the Supreme Court of Oklahoma Territory is as follows: "All that part of the Cherokee Outlet which lies between the line dividing ranges 3 and 4 west of the Indian meridian and the line dividing ranges 6 and 7 east of the Indian meridian, except township 20 of ranges 1, 2, 3 and 4, east of the Indian meridian, and all the lands occupied by the Kansas, Tonkawa, Ponca, Otoe and Missouri tribes of Indians, and all that part of land occupied by the Osage Indians which lies west of the line between ranges 6 and 7 east of the Indian meridian, and all that part of the Iowa, Kickapoo and Sac and Fox countries which lies north of the line which divides townships 14 and 15 north of ranges 1, 2, 3, 4, 5 and 6, east of the Indian meridian." (Record, page 18.)

A part of the territory so attached to Logan county as aforesaid, to-wit: "All that part of the Cherokee Outlet which lies between the line dividing ranges 3 and 4 west of the meridian, and the line dividing ranges 6 and 7 east of the meridian, except township 20 of ranges 1, 2, 3 and 4, east of the Indian meridian," is outside of the boundaries of Oklahoma Territory.

All the other part so attached, to-wit: "All the lands occupied by the Kansas, Tonkawa, Ponca, Otoe and Missouri tribes of Indians, and all that part of the lands occupied by the Osage Indians which lies west of the line between ranges 6 and 7 east of the Indian meridian; and all that part of the Iowa and Kickapoo and Sac and Fox countries which lies north of the line which divides townships 14 and 15 north of ranges 1, 2, 3, 4, 5 and 6 east of the Indian meridian," is situate within the boundaries of the Territory of Oklahoma, and is Indian country.

The indictment charges that the larceny was committed in "That part of the Territory attached for judicial purposes to Logan county, as aforesaid, which said part of said Territory was then and there Indian country." It therefore was not committed in the Cherokee outlet that lies outside of Oklahoma Territory, although a part of it is attached to Logan county for judicial purposes.

It therefore follows that the offense was committed within the jurisdiction of the courts of the Territory of Oklahoma, and not within the jurisdiction of the courts of the Indian Territory.

The organic act creating Oklahoma Territory repeals the jurisdiction of all courts held beyond and outside the limits of the Territory of Oklahoma and the Cherokee Outlet, and vests it in the Oklahoma Territory courts, and as these courts have no extra Territorial jurisdiction and no jurisdiction over offenses committed within the Indian Territory, it therefore follows that they have no authority or jurisdiction to impose the penalties under the act of February 15th, 1888.

They have jurisdiction and power only to try those offenses that are committed within the boundaries of said Oklahoma Territory and the Cherokee Outlet thereto attached, and for the punishment of such offenses have authority to apply those laws only that were enacted by the Territorial Assembly or the Congress of the United States.

The Oklahoma Territory and the Cherokee Outlet are no more a part of the Indian Territory than the State of Ohio is a part of the State of Kentucky.

The courts of Oklahoma would have as much authority to *try* offenses *committed in the Indian Territory*, as defined in section 29 of said act of May 2, 1890, as they have to apply the laws, especially enacted, for the punishment of offenses in the Indian Territory, to the punishment of offenses committed in the Oklahoma Territory, or the Cherokee Outlet thereto attached.

If such application could be made, by the same token the courts of Ohio could enforce the laws of Indiana, vice versa.

The appellant contends that the act of February 15th, 1888, applies to the case at bar, because the offense was committed in *Indian country*. This is upon the theory that the *Indian country* described in the indictment, and *the Indian Territory* are one and the same.

This claim cannot be successfully made. The *Indian country* in the indictment described and *the Indian Territory* are vastly different. There is *Indian country* (that is, country occupied by Indians, which has never been ceded to the United States by treaty or otherwise) within the boundaries of many of the different States and Territories of the Union, to wit: New York, Michigan, Dakota, Colorado, Arizona, New Mexico, Oklahoma Territory and many others.

U. S. vs. Ewing et al., 47 Fed. R. 809.

U. S. vs. Partello, 48 Fed. R. 670.

Cook vs. U. S., 138 U. S. pp. 157-185.

There is only one tract of country in the United States to which the name "The Indian Territory" is applied.

The Indian Territory at the passage of the act of February 15th, 1888, and to which said act was made to apply, was that tract of country bounded on the north by Kansas and Colorado, on the east by Missouri and Arkansas, on the south by Texas and on the west by Texas and New Mexico. Congress, long prior to that time, had so recognized it and the map makers of the world had so bounded it.

Said territory then included what is now the Indian Territory, Oklahoma Territory, the Public Land strip, and that part of the Cherokee Outlet not included in Oklahoma.

The Indian Territory was contracted by the act of May 2d, 1890, Sec. 29, thereby contracting the jurisdiction of its courts and the operation and effect of the laws thereto enacted for it.

All other Territory of the United States had, prior to February 15th, 1888, been organized into States or Territories having law making powers and governments of their own, except the Indian Territory which had no law making power but the Congress of the United States.

This seems to us to be a logical reason for the passage of such an act by Congress, but it certainly will not be contended that said act ever did or ever was intended to apply in those States before mentioned as having Indian country within their borders, especially in view of the decision of the court in the Ewing case, 47 Fed. R. p. 809.

It is argued by the appellant that the offense may have been committed in the Cherokee Outlet and therefore the act of February 15th, 1888, would apply. Even if it be true that the crime was committed in the Outlet, that country is no part of the Indian Territory while a *part* of it *is* within the boundaries of the Oklahoma Territory, and as the indictment charges the offense to have been committed in the Oklahoma Territory, it must necessarily follow that, if committed in the Outlet at all, it was committed in that part of it which lies within the boundaries of Oklahoma. But if the offense was committed in the Cherokee Outlet, outside the Territory of Oklahoma, the act of February 15th cannot apply. The act of May 2d, 1890, gives the Oklahoma courts jurisdiction over the Cherokee Outlet. The argument that the Indian Territory courts have no jurisdiction over Oklahoma, and that the Oklahoma courts have no jurisdiction or power to enforce the act of February 15th, aforesaid, applies to the Cherokee Outlet as well, for the reason that said Outlet is no part of the Indian Territory, therefore the courts having jurisdiction over offenses committed in the Indian Territory have no *jurisdiction* over offenses committed in said Outlet.

Another reason urged by the appellant why the act of February 15th, 1888, applies in this case is because the act of March 1st, 1889, Vol. I, Sup. U. S. R. S., page 670, entitled "An Act to establish United States Courts in the Indian Territory, and for other purposes," does not provide a penalty for horse stealing in the Indian country, and Congress, for that reason, must have considered the act of February 15th, 1888, to be in force.

Said act of February 15th, was a special act for the punishment of horse stealing in the Indian Territory. The act of March 1st, 1889, was an act to establish a court for the Indian Territory having jurisdiction over misdemeanors and fixing the punishment for certain misdemeanors. It provided punishment for no offenses that are felonies, and was given no jurisdiction over felonies. It is conceded that said act of February 15th, 1888, was in force in the Indian Territory and intended by Congress to be in force therein when the act of March 1st, 1889, was passed, and so continued to be in force until the passage of the act of May 2d, 1890, creating Oklahoma Territory. Section 29 of said act of May 2d, 1890, limited the Indian Territory to certain boundaries therein defined, which included no part of the Oklahoma Territory or the Cherokee Outlet thereto attached for judicial purposes. It also limited and confined the jurisdiction of the courts of the Indian Territory to the limits of said Indian Territory as therein defined. Therefore the act of February 15th, 1888, would necessarily be limited to the Indian Territory as defined by said section 29, for the reason that no courts except those having jurisdiction over the Indian Territory was given power or authority to enforce said act.

This contention that the act of February 15th, 1888, applies to the case at bar is not sound. It is in direct contradiction of the doctrine laid down by the court in the case of the United States vs. Ewing et al., 47 Fed. R., 809, decided some three years after the passage of the act of February 15th, 1888. In this case Ewing et al. were indicted for stealing horses from an Indian, on an Indian reservation in the State of Dakota. The reservation was held to be Indian country under the sole and exclusive jurisdiction of the United States; and sentence was passed under Section 5356, not under the act of February 15th, 1888. It is of no consequence that the offense was committed against the property of an Indian, the punishment would have been the same if it had been against the property of a white man. The subject matter would work no change in the punishment, provided the Court had jurisdiction over the place where the offense was committed.

U. S. vs. Partello, 48 Fed. R., 670.
In re Wilson. 140 U. S., 575.
McCall vs. U. S., 1 Dakota, 320.

III.

Is the sentence void?

Conceding for the sake of argument that the appellee was sentenced under the act of February 15th, 1888, and that the court had jurisdiction to sentence him under said act, the sentence is still void because he was sentenced to imprisonment for five years at hard labor. The act provides for simple imprisonment. The *hard labor part* of said sentence is excessive, unlawful, without warrant of law, and the entire sentence consequently void.

In the courts of the United States the rule is that a judgment in a criminal case must conform strictly to the statute, and any variation from its provisions, either in character or extent of the punishment inflicted, renders the judgment actually void.

In re Graham, 138 U. S., 461.
Ex parte Lange, 18 Wall., 163.
In re Mills, 135 U. S., 263.
Ex parte Karstendick, 93 U. S., 396.
In re Johnson, 46 Fed. R., 477.
Harmon vs. U. S., 50 Fed. Rep., 921.
Ex parte Snow, 120 U. S., 274.
Hans Neilson, Petitioner, 131 U. S., 176.
Ex parte Virginia, 100 U. S., 339.
Ex parte Seebold, 100 U. S., 371.
Ex parte Roland, 104 U. S., 604.
In re Coy, 127 U. S., 731.
Ex parte Kelly, 63 Cal., 175.
People vs. Liscom, 60 N. Y., 590.
State vs. Gray, 37 N. J. Law, 368.
People ex rel, Risley 38 Hun. (N. Y.), 208.
Ex parte Page, 49 Mo., 291.

The appellee does not concede that the court had jurisdiction to try and sentence him under said act of February 15th, 1888, but insists that he should have been tried and sentenced under Section 5356, R. S. U. S. In fact the indictment follows the language of this section, which provides that "Every person who, upon the high seas, or in any place under the exclusive jurisdiction of the United States, takes and carries away, with intent to *steal or purloin,* the personal goods of another, shall be punished by a fine of not more than one thousand dollars, or by *imprisonment not more than one year,* or by both such fine and imprisonment."

See Gould and Tucker's notes to Section 5356.

Section 5356 is made to apply to the case at bar by Section 2145, R. S. U. S., which reads as follows: "Except as to crimes, the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the *Indian country.*"

The crime of larceny is one not expressly provided for by the title, of which Section 2145 is a part.

The appellee should have been tried and sentenced under the general law, and therefore should have been imprisoned for a period not longer than one year.

The sentence under which the appellee is held is void, not only because the imprisonment is for *five years at hard labor,* instead of *one year,* but because he was sentenced to imprisonment in a *penitentiary.* Section 5541, R. S. U. S., provides that "In every case where any person convicted of an offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any State jail or penitentiary, etc."

This section has been interpreted to mean that where persons are sentenced to imprisonment for one year or less the sentence can not be executed by imprisonmeni in a penitentiary.

In re Mills, 135 U. S. 263.

If, therefore, the sentence should have been imposed under Sec. 5356, as we contend, it is void, because :

1. The appellee was sentenced to imprisonment in a penintentiary.

2. The imprisonment was for five years at hard labor, instead of one year without hard labor.

The appellee has already served a longer term of imprisonment than could legally have been imposed for the offense charged and should be released.

IV.

Is the remedy by writ of habeas corpus or error ?

The appellee contends that, if the judgment and sentence, or a part thereof, are void either because the court that rendered them was not competent to do so for want of jurisdiction, or because the court has exceeded its jurisdiction, or for any other cause showing a want of authority to hold the prisoner under the sentence, the party imprisoned by virtue of such judgment or sentence may be discharged on habeas corpus. And if the appellee is held without any lawful authority, or by judgment or sentence which is in excess of the jurisdiction of of the court that rendered it, or if there was a want of jurisdiction, the court will in favor of liberty grant a writ of habeas corpus.

Am. and Eng. Ency. of Law, Vol. 9, p. 236 (a).
Ex parte Lange, 18 Wall., 163.
Re Neilson, 131 U. S., 176.
Ex parte Roland, 104 U. S., 604.
Ex parte Seebold, 100 U. S., 371.
Ex parte Parks, 93 U. S., 18.
In re Mayfield, 141 U. S., 107 (In op. Jus. Brown, p. 116.)
Re Terry, 128 U. S., 289.
Re Coy, 127 U. S., 731.
Re Monroe, 46 Fed. Rep., 52.

Ex parte Perkins, 29 Fed. Rep., 908.
U. S. vs. Rodgers, 23 Fed. Rep., 658.
In re Snow, 120 U. S., 274.
Ex parte Bain, 121 U. S., 1.
Ex parte Royall, 117 U. S., 241.
Ex parte Fish, 113 U. S., 713.
Ex parte Varbough, 110 U. S., 651.
Ex parte Wilson, 114 U. S., 417.
In re Lee-Tong., 9 Sawyer, (U. S), 335.
U. S. on Rel. Spink, 19 Fed. Rep., 631.
Ex parte McCready, 1 Hughes, (U. S.), 598.

We submit that the judgment in this case is void, and therefore a writ of habeas corpus is the proper remedy.

We desire to call the attention of this court to the fact that the statements contained in the letter of Horace Speed, attached to appellant's brief, are entirely outside of the record, and should not be considered as evidence in this case.

It is impossible, from the letter of Mr. Speed, to tell whether the horses were taken through that part of the Cherokee Outlet attached to Logan county or through that part attached to some other county. Neither is it possible to tell whether the horses were "carried" through the Sac and Fox and Iowa Indian Reservations attached to Logan county or that part attached to some other county. Neither does the record show that the prisoners were indicted for a conspiracy, as charged in said letter; nor were they convicted of a conspiracy. The records show each one to have been convicted of a separate and distinct offense.

Coming now to the question as to whether the Territorial side of the courts of Oklahoma had jurisdiction of the offense charged. It is conceded that the U. S. side of said courts had jurisdiction of the offense as charged in the indictment.

The act of May 2d, 1890, section 11, put the laws of the State of Nebraska in force in Oklahoma Territory until after the adjournment of the first session of the legislative assembly of said Territory.

It is conceded, however, that Section 5702 of the Nebraska criminal code did not and could not apply to the offense charged.

The Nebraska law only was applicable until the adjournment of the first session of the Territorial assembly, and by reference to the statutes of Oklahoma it will be observed that the Secretary of the Territory certifies that the first session adjourned on the 24th day of December, 1890. The petitioners were not tried until February, 1891.

Section 5930, Oklahoma statutes, continues the laws of Nebraska in force as to all prosecutions pending at the adjournment of the Legislature, but this could only be done as to offenses against the laws of the Territory, and not as against the laws of the United States.

Congress is the only power that could continue such laws in force as to offenses against the laws of the United States.

If the Nebraska law was applicable, the Territorial side of the court would have been the proper one to have tried the petitioners, and not the United States side.

Respectfully submitted,

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D K Watson *Attorneys for Appellee.*